IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 185 of 2006
With
CIVIL APPLICATION No. 7936 of 2006
With
APPEAL FROM ORDER No. 188 of 2006
With
CIVIL APPLICATION No. 8132 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COUNTRY CASTLE RESORTS PVT.LTD - Appellant(s)
Versus
NATVARLAL TRIKAMLAL PATEL & 1 - Respondent(s)
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Appearance :
Appeal from Order No. 185 of 2006.
Mr. S.N. Soparkar, Senior Advocate with Mr. Manav A. Mehta, for appellant.
Mr. Mihir Thakore, Senior Advocate with Mr. Nandkishore Mehta for respondents.

Appeal from Order No. 188 of 2006.
Mr. Mihir Thakore, Senior Advocate with Mr. Nandkishore Mehta for appellants.
Mr. SN Soparkar, Senior Advocate with Mr. Unmesh Shukla and Mr. Kinjal Pandya for respondent.

CORAM: HONOURABLE MR JUSTICE A.M. KAPADIA

Date of JUDGMENT:03-08-2006

COMMON C.A.V. JUDGMENT

1. These two Appeals from Order filed under Order 43 Rule 1 (r) of the Code of Civil Procedure ('the Code' for short) are directed against the order dated 30.6.2006 recorded below application Ex.5 in Special Civil Suit No.225 of 2005 by the learned 4th Additional Senior Civil Judge, Ahmedabad (Rural), at Ahmedabad by which the application filed by the appellant of Appeal from Order No. 185 of 2006 under Order 39 Rules 1 and 2 of the Code, seeking interim injunction during the pendency of the suit for restraining

the respondents, their agents, servants, assignees, men, executors, relatives, power of attorney, person, representatives, heirs and legal representatives, etc., with regard to the property bearing City Survey No.86/1/2 admeasuring 01-90-86 Hectare – Are, i.e., 19086 sq.mt., assessment at Rs.13.93 Ps. situated in the sim of village Gota of Dascroi Taluka of District Ahmedabad (hereinafter referred to as 'the suit land') came to be partly allowed and accordingly the respondents are directed to maintain status quo about the ownership of the suit property till final disposal of the suit and it is also held that as the appellant/plaintiff's possession is disputed one and not a legal one, ex-parte order is modified to that extent.

2. Since both these Appeals from Order arise out of the same order and with regard to the same suit land and litigating parties are also same and common question of law and facts are involved, with the consent of the learned advocates appearing for the parties, the appeals

are heard together finally at the admission stage and disposed of by this common order.

3. The appellant of Appeal from Order No.185 of 2006 is the plaintiff whereas the appellants of Appeal from Order No.188 of 2006 are the defendants in Special Civil Suit No.225 of 2005. Therefore, for the sake of convenience and brevity, the parties hereinafter are referred to as they are arrayed in the trial court.

4. In order to appreciate the controversy raised in these two Appeals from Order in a better perspective, it would be advantageous to refer to the factual matrix of Special Civil Suit No.225 of 2005 which is filed by the plaintiff against the defendants seeking specific performance of the agreement dated 6.2.1992 alleged to have been executed by defendant No.1 in favour of the plaintiff in respect of the suit land and also permanent injunction.

(i) The plaintiff is a company registered under

the Indian Companies Act, 1956. Initially Pravinbhai Jasubhai Patel was acting as Managing Director of the plaintiff and thereafter Dashrathbhai Jasubhai Patel is the Managing Director of the plaintiff company. The suit land is running in the name of defendant No.1 as an owner and occupier and he had executed an agreement to sell in favour of the plaintiff on 6.2.1992. The said agreement to sell was registered in the office of the Sub-Registrar, Ahmedabad vide Serial No.2620. According to the plaintiff, the main conditions of the agreement to sell entered into between the plaintiff and defendant No.1 are as follows:

(A) The sale price of the suit land is fixed at Rs.15/- per sq. ft. totaling to Rs.3,01,290.00. Out of the said sale price, the plaintiff has paid to defendant No.1 Rs.15,000/- vide cheque No.451151 dated 6.2.1992 drawn on Dena Bank.

(B) As mentioned in the conditions of the agreement to sell, it is for the plaintiff to

obtain permission under the Urban Land (Ceiling & Regulation) Act, 1976 ('the ULC Act' for short) and Bombay tenancy and Agricultural Lands Act ('the Tenancy Act' for short) and the permission from Ahmedabad Urban Development Authority ('AUDA' for short) and the permission of for Non-Agricultural ('NA' for short) use of the land. However, it is the responsibility of defendant No.1 to offer necessary signatures, witnesses, applications, replies, verification, declaration, bonds, etc., for the said work. The term of the agreement to sell is decided to be nine months from obtaining all permissions including the ULC permission.

(ii) It is further case of the plaintiff that defendant No.1, after executing the agreement to sell in favour of the plaintiff and after obtaining all remaining amount of the sale consideration, handed over the clear, vacant and peaceful possession of the suit land, as a part

performance of the agreement, to the plaintiff for carrying out construction and development and thus the plaintiff possesses the clear possession of the suit land. It is also the case of the plaintiff that it had obtained necessary development permission and had got the plan sanctioned from AUDA to construct Farm House on the suit land and thereafter the plaintiff has constructed a Farm House on the suit land at its own cost.

(iii) The Deputy Collector, Viramgam Prant, Ahmedabad had issued notice and initiated proceedings with regard to the construction, wherein also the plaintiff had remained present and participated in all necessary proceedings and on account of the said proceedings, the Deputy Collector, Viramgam Prant, Ahmedabad had withdrawn the notice.

(iv)It is the case of the plaintiff that it was and is ready and willing to purchase the suit land as per the conditions of the agreement to

sell but that defendant No.1, after executing the agreement to sell in favour of the plaintiff, did not comply with the conditions appropriately by not initiating any proceedings to obtain permission under the ULC Act, Tenancy Act and for NA permission. Defendant No.1 had not given necessary signatures, signatures in bonds, applications, etc., and thus no permission was granted because of the fault of defendant No.1 and as a result thereof the specific execution of the agreement to sell could not take place.

(v) The plaintiff, time and again, requested defendant No.1 to acknowledge the remaining sale consideration after fulfilling the conditions of the agreement to sell and to execute a registered sale deed in favour of the plaintiff. In response to the requests of the plaintiff, defendant No.1 had given false trust and assurances and had passed the time. Defendant No.1 had never ever denied the plaintiff to execute the sale deed, nor had initiated any action for taking the possession of the suit land back from the

plaintiff nor defendant No.1 had ever sent any notice or letter in this regard.

(vi) As per the case of the plaintiff, it has come to its knowledge that defendant No.1 had on 8.12.2005 forged an absolutely false sale deed in respect of the suit land in the name of defendant No.2 and the said sale deed is utterly false, illegal, void ab-initio, nullity and without any consideration. According to the plaintiff, there is very close connection and relationship between defendant No.1 and 2 and defendant No.2 and Pankajbhai Patel, son of defendant No.1 are staying together by virtue of Maitri Karar (Friendship Agreement) and in this manner, defendant No.1 and 2 have, only with a view to make a show, forged the sale deed. No amount was paid and the said sale deed was without consideration and, therefore, it is unenforceable. It is the case of the plaintiff that the possession of the suit land has not been transferred by the way and mode as stated in the said sale deed. According to the plaintiff, when

there is an agreement to sell executed by defendant No.1 in favour of the plaintiff and possession of the suit land is handed over to it, defendant No.1 had no right, title or locus standi to execute the sale deed in favour of defendant No.2. Therefore, according to the plaintiff, defendant No.2 has not acquired any right, title or possession of the suit land by virtue of the said sale deed.

(vii) It is further case of the plaintiff that the plaintiff has strictly complied with all the conditions of the agreement to sell. However, defendant No.1 has committed breach of the conditions by executing a false sale deed dated 8.12.2005 in favour of defendant No.2 and, therefore, the plaintiff contacted defendant No.1 but defendant No.1 gave evasive reply and refused to execute the sale deed and he gave a clear threat that he will somehow or the other create muddle by making more transfers in collusion with defendant No.2 and defendant Nos.1 and 2 also gave threat to snatch away the

possession of the suit land from the plaintiff.

(viii) The plaintiff, therefore, filed the suit for the following reliefs:

> (A) Be pleased to issue decree of specific performance of contract in favour of the plaintiff and against defendant No.1, directing defendant No.1 to execute a registered sale deed in respect of the suit land as mentioned in para-1 of the suit in the name of the plaintiff by specific performance of the registered agreement to sell bearing Registration No.2620 executed on 6.2.1992 by defendant No.1 in favour of the plaintiff;
>
> AND/OR if defendant No.1 does not execute registered sale deed in the name of the plaintiff as per the order of the Hon'ble Court, then be pleased to get executed the sale deed by court commissioner in favour of the plaintiff.

(B) Be pleased to pass an order declaring the Registered Sale Deed dated 8.12.2005 entered into between defendant No.1 and 2 in respect of the suit land as mentioned in para-1 of the suit to be illegal, without any consideration, nonfeasance, void ab-initio and thereby cancel the same.

(C)Be pleased to pass permanent injunction order, permanent in nature, in favour of the plaintiff and against the defendant No.1, restraining the defendants or their servants, agents, assignees, persons, executors, relatives, attorneys, transferees, representatives, lineage, guardian, heirs, etc., from transferring, assigning or alienating the suit land as mentioned in para-1 of th suit to any third person by way of sale, mortgage, gift or otherwise; or from making objection, hindrance or interference in the peaceful occupation and possession of plaintiff in the suit land' or from creating any right, lien, charge, or liability of any

individual, institute or bank over the suit property and from executing or got executed any writings, deeds or documents in respect of suit property.

(D) Be pleased to award the costs of this suit from defendant No.1.

(E) Be pleased to pass such other and further relief/s as may be deemed fit and proper to this Hon'ble Court.

(ix) Along with the suit, the plaintiff has also filed application Ex.5 under Order 39 of the Code seeking interim relief against the defendants. In the said application the plaintiff has submitted almost similar and identical contentions which have been averred in the plaint. It is also averred in the application that the plaintiff has a prima facie case and balance of convenience tilts in its favour and against the defendants and if the injunction is not granted then irreparable loss, not capable of being

compensated in terms of money, will be caused to it and on the other hand if the injunction as prayed or is granted the defendants will not suffer any loss or injury. Therefore, it is the case of the plaintiff that it is entitled to interim relief as prayed for in the application Ex.5.

(x) In the application Ex.5, the plaintiff has prayed for the following interim relief:

> (A) Be pleased to pass ad-interim injunction order till the final disposal of the present suit in favour of the plaintiff and against defendant No.1, restraining the defendants or their servants, agents, assignees, persons, executors, relatives, attorneys, transferees, representatives, lineage, guardian, heirs, etc., from transferring, assigning or alienating the suit land as mentioned in para -1 of the suit to any third person by way of sale, mortgage, gift or otherwise; or from making objection, hindrance or interference

in the peaceful occupation and possession of plaintiff in the suit land; or from creating any right, lien, charge, or liability of any individual, institute or bank over the suit property and from executing or got executed any writings, deeds or documents in respect of suit property.

(B) Be pleased to award the costs of this suit from defendant No.1.

(C) Be pleased to pass such other and further relief/s as may be deemed fit and proper to this Hon'ble Court.

5. The learned trial Judge, after hearing the learned advocate of the plaintiff, has vide order dated 17.12.2005, granted ex-parte ad-interim injunction by directing the defendants to maintain status quo with regard to the suit land till 5.1.2006.

6. On service of summons, defendant Nos.1 and 2

entered their appearance through their respective advocates and they filed separate reply against the plaint as well as against the application Ex.5.

7. Defendant No.1 filed his reply at Ex.24 wherein, inter alia, it has been stated that the suit as well as the application is barred by suppression of material facts and, therefore, the plaintiff is not entitled to any equitable relief. It is the case of defendant No.1 that the plaintiff has filed the suit on 17.12.2005 and obtained ex-parte ad-interim injunction on the same day and thereafter the Court Commissioner appointed by the Court issued the notice which came to be served on him at 8.00 A.M. on 27.12.2005 and the commission work was executed and thus sufficient time was not given to defendant No.1. According to defendant No.1, the report of the Court Commissioner clearly shows that a false report has been prepared in collusion with the plaintiff with a view to create evidence in favour of the plaintiff. After

execution of the commission work, the plaintiff, with the help of anti-socials, tried to harass him in order to snatch away the suit land and in spite of there being an order of status quo, they tried to make several different constructions after the commission work was over and thereby the plaintiff has committed contempt of court.

(i) It is further stated that defendant No.1 was the administrator and possessor of the suit land which is situated within the sim of village Gota, Taluka Dascroi, District sub-District Ahmedabad. The suit land is situated at the prima location after Sarkhej-Gandhinagar road came into existence and as there are number of clubs, hotels, restaurants, etc., on this road, Pravinbhai, one of the family relatives and fast friend of defendant No.1, suggested in the year 1991 that as he has more agricultural land, he has to make a farm house and also advised him to make a farm house as such it can be considered as center point. Defendant No.1 felt that the suggestion of Pravinbhai was proper and made up

mind to construct a farm house. After some time, Pravinbhai also expressed a view to establish his company and thereby intended to start the business of developing lands by establishing a company. Thereafter, as per the talks with Pravinbhai, defendant No.1 got prepared the plans by a conversant person and got the development permission from AUDA on 30.11.1991 for constructing a farm house. Pravinbhai thereafter informed him that he has established a company registered under the Indian Companies Act, 1956 in the name and style of “County Castle Resort Private Limited” on 5.12.1991 and he is the Managing Director of the company and other Directors of the company are his family members. Pravinbhai also stated that the actual running of the company will take long time and if defendant No.1 helps him by virtue of friendship, the company will be working properly. Therefore, on 6.2.1992 defendant No.1 agreed to sell his farm house for the development and sale to the plaintiff and executed a registered banakhat without possession. According to defendant No.1,

at the time of execution of the said banakhat, only Rs.15,000/- was taken under the guise of friendship and it is also clarified that they are farmers and if any proceeding takes place against them by the Government under the ULC Act in future that will adversely affect their reputation which cannot be tolerable. Only after the permission under the ULC Act and other permissions were obtained by Pravinbhai the sale deed will have to be executed. It is clearly submitted by defendant No.1 that as per the agreement to sell dated 6.2.1992, defendant No.1 has got only Rs.15,000/- till today. It is also stated that as per the terms and conditions of banakhat, the possession of the suit land was never handed over to the plaintiff. It is the case of defendant No.1 that after execution of the said agreement to sell, the plaintiff company has not made any correspondence with defendant No.1 regarding the permission. At the time of executing the banakhat, under the guise of obtaining necessary permission under the ULC Act on behalf of the plaintiff company, Pravinbhai

Jasubhai Patel got obtained signatures of defendant No.1 on the blank papers and informed him that he has started the procedure to obtain necessary permission from the competent authority but it is clearly stated that from 31.3.1999 till the ULC Act has been repealed and thereafter within nine months i.e., 30.12.1999 the plaintiff has not got obtained any permission nor he has given in writing to defendant No.1. Moreover, within the expiry period of banakhat, i.e., seven and half years, no notice has been issued to defendant No.1 by the plaintiff nor it has tried to get the sale deed executed and thereby as the date of agreement to sell dated 6.2.1992 has come to an end on 30.12.1999, the amount of Rs.15,000/- received as earnest money was forfeited by defendant No.1. The said condition was the main condition of the agreement and thereby it was the essence of contract. The said banakhat was executed for commercial cause and defendant No.1 is a farmer having agricultural land of old tenure and as the suit land is also of agricultural land and also of old

tenure, it is required to obtain N.A. permission, No Objection Certificate and necessary permission under the Bombay Land revenue Code but it does not appear that the plaintiff might have taken any effective steps for the same. Therefore also after execution of the said banakhat, from the very beginning the plaintiff was not eager to get executed the sale deed and blank papers on which the plaintiff has obtained the signatures of defendant No.1 with a view to move applications for necessary permissions under the ULC Act do not appear to have been used and such permissions have yet not been received.

(ii) According to defendant No.1, in the audit reports produced by and on behalf of the plaintiff company before the Registrar of Companies, the office address mentioned is of the residential address of Pravinbhai at Isanpur and the company has not yet started any business. Thus it is clear that the audit reports which have been produced by the plaintiff are of no avail. The company is registered for a resort

whereas the AUDA has given permission on 30.11.1991 to construct a farm house. According to defendant No.1, whatever construction had taken place at the farm house had been started by a friend of Pravinbhai and it was also according to the plans submitted and approved by AUDA and at that time defendant No.1 was in possession of the suit land and the said work remained incomplete on and from 1998 due to internal clash between the Directors of the company and the said work has got completed by defendant No.1. Thus, according to defendant No.1, the possession of the suit land was not given to the plaintiff company nor the plaintiff was in possession of the same and it can be clear from number of documents produced by defendant No.1 along with the list of documents.

(iii) According to defendant No.1, after completion of the required construction, defendant No.1 applied to the Gujarat Electricity Board to give electric connection of 15 HP at the cost of defendant No.1 and obtained

the same in 1998 and the said farm house is and was owned by and in possession and occupation of defendant No.1 and his HUF and so the said farm house has been given to his relatives on different occasions of marriage, party, etc., in the name of N.T. Patel Farm House.

(iv)It is further say of defendant No.1 that the birthday ceremony of the grand-son of his son Pankajbhai was performed on 15.12.2005 and it was covered under videography which is with him from which it can be seen that the plaintiff is and was not in possession or occupation of the farm house. Whenever it was necessary for Pravinbhai and his brother Dahsrathbhai to arrange any of their functions, the said farm house was given to them by virtue of friendship. The lawn, lighting situated in the open space of the suit land is of defendant No.1 himself and there is a permanent gardener who has been paid salary by him. Moreover, all taxes of Gram Panchayat and Government, revenue, Vaghoti, etc., as revised from time to time, in respect of the suit land,

have been paid by him and receipt thereof are with him which are produced with the list separately. It is also stated that since 2003-2004 the Government through Gota Gram Panchayat has assessed the tax in respect of the suit land and it was increased from Rs.10,000/- to Rs.3,00,000/- against which defendant No.1 filed an appeal before the Jilla Panchayat Tax Committee, Ahmedabad on 4.6.2004 for the excess assessment of tax and defendant No.1 himself remained present at all dates fixed therein and thereafter the officer nominated by the committee visited the suit land and considering the documents on record, cancelled the increased tax by order dated 1.10.2005. It is also stated that defendant No.1 has filed objections while the suit land was included under the TP Scheme by AUDA and in respect of the suit land a suit being RCS No.369 of 1999 was filed before the Civil Judge (JD), Ahmedabad (Rural) wherein the panchnama was carried out on 26.6.1999 from which it is clear that defendant No.1 was owner and in possession and occupation of the suit land. It is

stated by defendant No.1 that Pravinbhai, the Managing Director of the plaintiff Company, has made an application on 17.3.2004 to the Gram Panchayat to enter their name in the Government record in respect of suit land by virtue of the said agreement to sell which is already forfeited and in the said matter by taking into consideration the statements of both the parties, objections, cross-objections, explanations and the submissions of the panchas, the Resolution No.84 (33) was passed on 17.3.2004 and the application submitted by Pravinbhai vide resolution No.10 (10) dated 30.4.2004 was ordered to be stayed in presence of panchas. It is further case of defendant No.1 that after forfeiture of Banakhat under its conditions in December 1999, meaning thereby, after about six years after forfeiture of banakhat on 8.12.2005, the registered sale deed is executed after obtaining full consideration of Rs.7,00,000/- in favour of defendant No.2 and sent to the Sub-Registrar and, therefore, since 8.12.2005 there is no right, title and interest of defendant No.1

over the suit land and as such from that day onwards defendant No.2 has become owner and occupier and in possession of the suit land. Defendant No.1 has denied all the averments and allegations made in the plaint by giving parawise remarks.

(v) On aforesaid premises, it is submitted that the suit filed by the plaintiff is false, frivolous and it has no right to ask for specific performance of agreement as it has not come with clean hands. The plaintiff was not ready to perform its part of the contract as it remained silent after repeal of the ULC Act and, therefore, the plaintiff has no prima facie case. Balance of convenience does not tilt in favour of the plaintiff. If the interim injunction as prayed for is granted irreparable loss and injury would not be caused to the plaintiff. On the other hand, if the injunction is granted, irreparable loss and injury would be caused to defendant No.1. He, therefore, urged to dismiss the suit as well as application Ex.5.

8. Defendant No.2 has filed separate written statement at Ex.26 against the plaint as well as application Ex.5 filed by the plaintiff raising almost identical and same contentions as raised by defendant No.1 in his written statement. Besides this, it is also stated by defendant No.2 that the plaintiff was never in possession and occupation of the suit land. Thereafter when the suit was filed, the plaintiff by taking law in its hands, forcibly landed with a mob of about 150 persons at 6 A.M and for creating false evidence regarding possession, has displayed only the Boards by abusing the process of law and by this the possession of the plaintiff is not proved.

(i) While demonstrating as to how the plaintiff has misused the process of Court, defendant No.2 submitted that on 26.12.2005, Dashrathbhai Patel and Hiteshbhai Patel, the Directors of plaintiff company, got threatened the persons of defendant No.2 and were told that the possession and

occupation of the suit land be vacated and vacant and actual possession be given by morning of 27.12.2005 or else defendant No.2 and his family members will be done to death. As defendant No.2 came to know this fact, she came to the place of her father-in-law and on informing him all these facts he advised to lodge a police complaint immediately. Though defendant No.2 being a lady, she was compelled to lodge the complaint to the Police Inspector at Sarkhej Police Station at 12.00 hours at night. Upon making detailed inquiry with regarded to said complaint, the complaint was registered at 2.00 hours at night on 26.12.2005. However, as defendant No.2 thought it so, one more complaint was lodged by fax message at 1.03 A.M. on 27.12.2005 and after that the police came at the suit land at late night and gave concrete assurance and trust and undertaking and defendant No.2 was told that patrolling will be done every hour so that no untoward incident would occur. However, as it was preplanned , the acquainted persons had informed defendant No.2 that at 6.00 A.M. on

27.12.2005, the aforesaid persons along with their advocate, hired anti-social persons and Bharwads will come at her property and by forcibly trespassing, will create evidence of possession on the property and shall trespass the property in order to establish in the commission that possession is with them. As per information received, at 6.00 A.M., Dashrathbhai and his advocate Amitbhai Vyas and Notary Rajendrabhai Parshottambhai Patel and one another advocate, whose name defendant No2. did not know, made an attempt to trespass the premises along with their fleet and Dashrathbhai, who was possessing a licenced pistol, showed it to defendant No.2 and made his persons work in haste, had started affixing the Boards. In the meantime, husband of defendant No2. Pankajbhai made total 28 telephone calls at police station and informed at the control room also. However, as the police did not extend any help, the plaintiff and its persons succeeded in achieving its malafide intention at the site. Thereafter, as planned, as the Director of the plaintiff company phoned, the commissioner

went to defendant No.1 at his house for service. Therefore, he called defendant No.2 at his house saying that the persons from Court have come and during this time by taking disadvantage of the absence of defendant No.1, defendant No.2 and husband of defendant No.2, by threatening the security persons of defendant No.2 at the point of revolver, the work of painting the boards was started by entering the remaining persons in the disputed property. During this time the Commissioner issued the commission letter to the defendants and informed about the proceedings of commission/panchnama. Though it was improper, defendant No.2 being a lady, she did not utter a word and cooperated the commissioner and assisted in completing the proceeding.

(ii) Thereafter, after the work of commission was over, the police appeared at the site and though defendant No.2 was under fear, shock and mental stress, was told that defendant No.2 is a lady and she will not be able to fight these anti social elements and it will be better for her if

she would compromise and in this manner, she was pressurized to withdraw the complaint. In the meantime, husband of defendant No.2 telephoned Pravinbhai Jasubhai Patel, the Managing Director of the plaintiff company and informed him of the entire situation. Therefore, though he was aware of the same, by taking the husband of defendant No.2 into confidence, he was pressurized to withdraw the complaint and was asked not to do anything and that he will resolve the problem on his return. By having trust on these words, and considering the old relations and with a bonafide object that Pravinbhai, the Managing Director of the plaintiff company will resolve the problem, the police complaint was withdrawn by defendant No.2.

(iii) Thus, though the plaintiff was never in possession, by initiating court proceedings and by using Government machinery, with a malafide intention of making defendant No.2 a destitute, evidence is created and the Government machinery has aided in the same.

(iv) She has also stated that the entire incident has been recorded by her husband in video by remaining present during the entire incident, the CD of which is produced by her which she was ready to display as and when directed by the Court. Defendant No.2 has also denied all the averments made in the plaint as well as application Ex.5 by making parawise remarks. Therefore, it is not necessary to reproduce it again here.

(v) The sum and substance of the written statement filed by defendant No.2 is that she has become the owner of the suit land by sale deed dated 8.12.2005 and since then she is the lawful owner and in lawful possession and occupation of the suit land. The plaintiff has forcibly taken over possession under the cover of the order with regard to status quo granted by the trial court.

(vi) According to her, there is no prima facie

case in favour of the plaintiff nor balance of convenience tilts in its favour. According to her, no irreparable injury would be caused to the plaintiff if the injunction as prayed for is not granted. On the contrary, she is the lawful owner and is in possession and occupation of the suit land by virtue of the sale deed and if injunction as prayed for is granted, it would cause irreparable loss and injury to her and therefore she urged to dismiss the suit as well as application Ex.5.

9. In reply to the separate written statements and objections filed against the plaint as well as application Ex.5 filed by defendant Nos.1 and 2, the plaintiff has filed separate rejoinder wherein, inter alia, it raised almost identical contentions which it has raised in the plaint as well as application Ex.5 and further denied the averments made in the written statements filed by defendant No.1 and defendant No.2. Along with the rejoinder some additional documents were also filed. The plaintiff also denied the possession

of defendant No.2 on the suit land and ascertained that the plaintiff is in possession of the suit land and it has made construction on the suit land.

10. The trial court, having heard the learned advocates appearing for the plaintiff and the defendants and having perused the contents of the suit as well as the application Ex.5 and the documents annexed therewith and also the separate written statements filed by defendant Nos.1 and 2 and the documents annexed therewith and the rejoinder filed by the plaintiff along with additional documents, has held that defendant No.1 was in possession of the suit land at the time of filing of th suit and his possession was forcibly taken over by the plaintiff during the pendency of the suit. Still a part of the possession is with the defendants. Therefore, the plaintiff is not entitled to protection about the possession. It was also held that in a suit for specific performance of contract, the defendant cannot change the

ownership of the property and, therefore, to that extent the plaintiff has a prima facie case so far as ownership is concerned and if the suit land further changes the hands there will be multiplicity of proceedings. On the aforesaid findings, application Ex.5 filed by the plaintiff for interim injunction has been partly allowed and the defendants are directed to maintain status quo about ownership of the suit land till final disposal of the suit. As the plaintiff's possession is disputed one and not legal one, ex-parte order is modified to that extent. However, the trial court refused to pass an order of status quo ante i.e., for restoration of possession to the defendants in the absence of any application. It is this order which is the subject matter of challenge in these two Appeals from Order, one filed at the instance of original plaintiff being Appeal from Order No.185 of 2006 and another filed at the instance of original defendants being Appeal from Order No.188 of 2006.

11. Mr. Saurabh Soparkar, learned Senior Advocate with Mr. Manav Mehta, learned advocate of the plaintiff, have made elaborate submissions. Their submissions can be catelogued as under:

(i) The report of the Court Commissioner unequivocally suggests that at the time of filing of the suit as well as serving the process of the application Ex.5, possession of the suit land was with the plaintiff. The report of the Court Commissioner unequivocally suggests that there was sign board of the plaintiff and notice was also displayed by the plaintiff.

(ii)The plaintiff has represented before various authorities, such as, Deputy Collector, Panchayat authorities, etc., and hence it has tried its best to help defendant No.1 to obtain necessary permissions from various authorities.

(iii) Defendant No.1 did not cooperate with the plaintiff for getting necessary permissions in spite of repeated requests, callings and

reminders sent by the plaintiff and rendering full cooperation. The plaintiff was always ready and willing to perform its part of the contract whereas defendant No.1 was not ready and willing to perform his part of contract.

(iv)There is evidence to the effect that the plaintiff was handed over possession of the suit land by defendant No.1 on payment of balance amount of consideration and, therefore, the plaintiff was in lawful and physical possession of the suit land.

(v) The annual report coupled with the balance sheet produced by the plaintiff at Ex.39/3 to 39/10 (pages 254 to 289 of the appeal memo compilation) unequivocally suggest that the plaintiff has spent huge amount of Rs.47 lakhs on the suit land which was in multiple to the consideration paid by the plaintiff to defendant No.1. This fact itself is suggestive that possession of the suit land was handed over by defendant No.1 to the plaintiff otherwise the

plaintiff would not have spent such a huge amount on the suit land.

(vi) After execution of the banakhat (agreement to sell) between the plaintiff and defendant No.1, the plaintiff was banakhat holder and having made full payment obtained vacant possession of the suit land and, therefore, the plaintiff is entitled to retain the possession of the suit land and get the conveyance in its favour.

(vii) Though the trial court has held that it is a fit and proper case for specific performance of contract, the plaintiff is not entitled to protection of the possession and this finding of the trial court itself is erroneous and contradictory.

(viii) The lower court has committed grave error in holding that the plaintiff has forcibly taken over possession of the suit land from defendant No.1 during the pendency of the suit and still part of the possession is with defendants.

(ix) According to Mr. Soparkar, the suit is within time in view of Article 54 of the Limitation Act and as per Article 54 of the Limitation Act, the period for filing the suit for specific performance is three years and if no date for performance is fixed then it would reckon from the date when the plaintiff has noticed that the performance is refused by the defendants. In instant case, on the day when defendant No.1 sold the suit land to defendant No.2, presumption is drawn that defendant No.1 has refused performance. In support of the aforesaid contention, Mr. Soparkar, learned senior advocate of the plaintiff, has relied upon the following decisions:

(a) R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy, (2006) 2 SCC 428 (paras 9, 10 and 11).

(b) Shakuntala v. Narayan Gundoji Chavan and others, (1999) 8 SCC 587.

(c) D.S. Thimmappa v. Siddaramakka, (1996) 8 SCC

365 (para 6).

(x) The suit is not hit by Section 63 (1) (c) of the Tenancy Act as such the said provision is not applicable to the facts of the present case. In support of the aforesaid contention, Mr. Soparkar, learned Senior Advocate of the plaintiff has relied upon the following decisions:

(a) S. Rangaraju Naidu v. S. Thiruvarakkarasu, AIR 1995 SC 1796;

(b) Mrs. Chandnee Widya Vati Madden v. Dr. C.L. Katial and others, AIR 1964 SC 978;

(c) Bai Dosabai v. Mathurdas Govinddas and others, AIR 1980 SC 1334;

(d) Manzoor Ahmed Magray v. Gulam Hassan Aram and others, AIR 2000 SC 191; and

(e) Shah Jitendra Nanalal v. Patel Lallubhai

Ishverbhai, AIR 1984 Gujarat, 145.

(xi)Request for restitution and restoration of the suit land to defendant No.1 cannot be entertained at this stage. According to Mr. Soparkar, the said request is made on the strength of Section 151 of the Code. Defendant No.1 has relied upon Section 144 of the Code because the said section in terms does not apply to the present situation. Defendant No.1 has not made any application to the trial court for restitution and restoration of the suit land but such a request was made orally during the course of submissions. The trial court has not granted such request observing that the possession of the property on the date of the suit is a matter of serious factual dispute. Such refusal of restitution or restoration is not an appealable order and under Order 43 Rule 1 (r) of the Code against such refusal no appeal would lie. According to Mr. Soparkar, even independently of the question whether such appeal lies or not, there can be no question of restitution of

possession to defendant No.1 at this stage in view of the state of evidence before the trial court as defendant No.1 has prima facie failed to establish that he was in possession of the club. Therefore, nor restitution or restoration of possession can be ordered at this stage. In support of the aforesaid submission, he has relied upon the following decisions:

(a) V. Hucheswaran v. Madras Hardware Mart, (2005) 8 SCC 496 (para 16).

On the aforesaid premises it is contended by Mr. Soparkar that the order impugned so far as directing defendants to maintain status quo till disposal of the suit is concerned, it does not require any interference whereas the order holding that the plaintiff's possession is a disputed one and not legal one and ex-parte order is modified to that extent deserves to be quashed and set aside by holding that the plaintiff is in lawful possession of the suit land and thereby allow the application Ex.5 in toto. Therefore, he

submitted that Appeal from Order No. 185 of 2006 filed by the plaintiff deserves to be allowed to the aforesaid extent and Appeal from Order No.188 of 2006 filed by the defendants deserves to be dismissed. He, therefore, urged to allow the Appeal from Order No.185 of 2006 by setting aside the order holding that the plaintiff's possession of disputed one and not legal one and ex-parte order is modified to that extent and thereby to hold that the plaintiff is in lawful possession of the suit land and the by-parte order dated 30.6.2006 directing the defendants to maintain status quo with regard to possession of the suit land till disposal of the suit be maintained and the Appeal from Order No.188 of 2006 filed by the defendants may be dismissed.

12. Per contra, Mr. Mihir Thakore, learned Senior Advocate with Mr. Nandkishore Mehta, learned advocate of the defendants, argued the matters at length and in great detail by showing several documents. The submissions advanced by them can be summarized as under:

(i) The agreement to sell (banakhat) dated 6.2.1992 discloses payment of only Rs.15,000/- as bana amount against the total consideration of Rs.3,01,290/- payable by plaintiff to defendant No.1. There is no evidence produced by the plaintiff to show if any further amount has been paid by it to defendant No.1 and, if paid, when it was paid and when the possession of the suit land was handed over by defendant No.1 to it. In this connection, vague pleadings are made by the plaintiff which cannot be given any countenance and no reliance can be placed upon such vague pleadings.

(ii) The ex-parte ad-interim injunction was granted on the application Ex.5 on 17.12.2005 and the order of local inspection was also made on the same day. However, the plaintiff did not serve the said order on 17.12.2005 with a view to create evidence of possession by forcibly entering into the suit land and the said action on the part of the plaintiff is nothing but

trespassing into the land of the defendants. The plaintiff has literally entered in the suit land only after obtaining order from the trial court and before the Commissioner visited the site. This is obvious from the commissioner's report.

(iii) The plaintiff is not entitled to equitable relief when it has not served the order of ex-parte ad-interim injunction for a period of 10 days and not taking Court Commissioner to visit the suit site for preparing the report.

(iv) The banakhat in respect of the suit land was executed on 6.2.1992 which is not enforcible in the eyes of law and the trial court has committed a fatal mistake in relying upon the said document.

(v) As per the terms and conditions of the banakhat dated 6.2.1992 the plaintiff undertook to obtain necessary permission from the competent authority and defendant No.1 was under the

obligation to give only signatures on the applications/documents prepared by the plaintiff and put before defendant No.1 whenever it was necessary to be submitted before the competent authority. The plaintiff has not produced any evidence to show as to on which date it has prepared necessary documents seeking permission from the competent authorities under ULC Act, Tenancy Law, AUDA or for NA permission and put for signature before defendant No.1.

(vi) The most important clause of banakhat is that the sale deed was to be executed within nine months from the date of obtaining such permissions from the ULC authorities. It was obligatory on the plaintiff to obtain permission from ULC authorities. Though ULC Act was repealed on 31.3.1999 thereafter also the plaintiff has not sought for permission from other authorities like Tenancy, AUDA, NA permission and on repeal of the ULC Act with effect from 31.3.1999, the period commenced from that date and within nine months from that date the plaintiff had to take

action for execution of the sale deed.

(vii) Therefore, according to the defendants, the period of nine months had expired on 31.12.1999 and thereafter within three years the suit had to be filed. Admittedly the suit is filed on 17.12.2005 and therefore the suit is time barred.

(viii) The plaintiff was never ready and willing to perform its part of the contract therefore it sat idle since 1992 and not tried or attempted to obtain required permission from ULC authorities, AUDA, Tenancy Authority and NA permission and even after repeal of the ULC Act also it sat silent for more than five years.

(ix)At the time of panchnama, the door was opened by defendant No.2 which shows that defendant No.2 was in possession of the suit land.

(x) One of the glaring facts is that defendant No.2 has sent the complaint to Sarkhej Police

Station in the intervening night between 26.12.2005 and 27.12.2005 at about 1 O' clock in the night in respect of the threat given by the plaintiff and/or its agents and persons.

(xi) The inspection reports of Gujarat Electricity Board clearly establishes that the electricity connection is taken in the name of defendant No.1 and on each occasion son of defendant No.1 was present in the premises. This also clearly establishes that the possession of the suit land was with defendant No.1. Electricity Bills including electricity bill with respect to theft have been paid by defendant No.1 and defendant No.1 is in possession of all the original receipts.

(xii) All revenue receipts from 1974 to 2006 are produced by defendant No.1 and paid by defendant No.1 which also shows that defendant No.1 was in possession of the suit land all throughout.

(xiii) Panchayat tax receipts from 1999 to 2003 and 2005-06 are also produced by defendant No.1 showing that defendant No.1 was in possession of the suit land.

(xiv) Objection against revised assessment of Panchayat Tax was also raised by defendant No.1 and the appeal was decided in favour of defendant No.1.

(xv) Search conducted by Service Tax Department in the premises on 19.2.2004 and the panchnama clearly mention the presence of Pankajbhai Natvarbhai Patel, son of defendant No.1 which also clearly establish the possession of defendant No.1 over the suit land.

(xvi) Panchnama in Civil Suit No.369 of 1999 in a dispute between defendant No.1 and his nephew, clearly indicates that NT Patel Farm House is being run in the premises and the possession is with defendant No.1.

(xvii) Income tax return filed by defendant No.1 discloses income from NT Patel Farm House which would also establish that defendant No.1 was using the said property for giving it on rent for functions.

(xviii) The plaintiff has forcibly snatched away the possession of the suit land from defendant No.1 by muscle power under the cover of the ad-interim order of status quo.

(xix) The agreement to sell executed by the plaintiff and defendant No.1 is an agreement to sell agricultural land. Plaintiff is not an agriculturist and as such the said agreement to sell is hit by the provision of section 63 (1) (c) of the Tenancy Act and therefore the said agreement is not enforcible at law and therefore on the basis of the said agreement, the plaintiff is not entitled to specific performance of the said agreement.

(xx) An Appeal from Order is a continuation of

proceedings before the trial court and being continuation of the proceedings before the trial court, the High Court can pass all appropriate orders which the rial court could have passed to restore the status quo ante. This power is an inherent power available to all courts to do justice and no technicalities can or should come in the way of the court from doing what is necessary to be done, particularly when the plaintiff has abused the process of the court. No mercy can be shown to a person who comes with unclean hands and abuses the process of the court. The principles for restitution or restoration of status quo ante are clearly laid down by the Supreme Court as well as this Court and other High courts.

(xxi) In support of aforesaid contention, Mr. Thakore has relied upon the following decisions:

(a) Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd, AIR 1995 SC 441.

(b) South Eastern Coalfields Ltd. v. State of MP, AIR 2003 SC 4482,

(c) Dhirajlal Vithaldas Kavaiya v. Rasiklal Chandual Patel, 34 (1) GLR 206, and

(d) Mir Bazlay Ali v. Jagirdar Nirkhy Mir Mahammad Ali and others, AIR 2006 AP 131.

(xxii) The plaintiff's hands are not clean and the plaintiff has abused the process of the court by not serving the process for ten days with a view to natch away forcibly the possession of the suit land. Therefore, the plaintiff is not entitled to discretionary relief of injunction. According to defendants, when the trial court has come to the conclusion that possession of the plaintiff is not legal one it ought to have granted status quo ante by directing the plaintiff to restore the possession of the suit land in favour of defendant No.2.

In aforesaid premises, it is contended by

Mr. Thakore, senior advocate of the defendants, that the order passed by the trial court below application Ex.5 directing the defendants to maintain status quo in respect of the suit land till disposal of the suit and by not exercising its inherent powers under section 151 of the Code to restore status quo ante as existed on the date of the suit which has been snatched away by the plaintiff under the cover of the order of trial court deserves to be quashed and set aside by dismissing the application Ex.5 in toto and directing the order of status quo ante directing the plaintiff to restore the possession of the suit land to defendant No.2 by allowing Appeal from Order No.188 of 2006. He therefore urged that Appeal from Order No.188 of 2006 may be allowed and thereby the application Ex.5 may be dismissed in toto and the plaintiff may be directed to restore the status quo ante as existed on the date of the filing of the suit in exercise of powers conferred under section 151 of the Code and the plaintiff may be directed to restore the possession of the suit land in favour

of defendant No.2 whereas Appeal from Order No. 185 of 2006 filed by the plaintiff may be dismissed.

13. This Court has carefully considered the rival contentions advanced by the learned advocates appearing for the parties at bar. This Court has also perused the averments made in the plaint, application Ex.5 seeking interim injunction, documents annexed therewith, separate written statements filed by both the defendants together with documents annexed therewith, separate rejoinder filed by the plaintiff along with additional documents, the order which is impugned in these Appeals from Order and the judgments cited at the bar by the learned senior advocates appearing for the parties and also the exhaustive written submissions rendered by them.

14. There is no dispute that the registered banakhat (agreement to sell) dated 6.2.1992 in respect of the suit land was executed by defendant No.1 in favour of the plaintiff

company. As per the terms and conditions of the said banakhat, it is agreed that 19086 sq.mt. Of agricultural land was to be sold by defendant No.1 to the plaintiff company. The agreed price was Rs.15/- per sq.mt. and the plaintiff has paid token bana amount of Rs.15,000/- on the same day. It is also agreed between the parties that the time within which the conveyance is to be executed in nine months on obtaining necessary permission for executing the sale deed from ULC authorities, Tenancy Authorities, AUDA and authorities for NA Permission. The responsibility of obtaining such permissions was of the plaintiff and the only responsibility of defendant No.1 was to sign applications/documents when called up to do so for such permissions, put forward by the plaintiff.

15. In the aforesaid back drop of undisputed facts, now we have to examine whether the plaintiff is entitled to get specific performance of the contract dated 6.2.1992 from defendant No.1 or from defendant No.2. It is also the case

of the plaintiff that the possession of the suit land was also handed over to it by defendant No.1 on payment of full consideration. These facts are seriously disputed by defendant No.1, as according to him, possession of the suit land was never handed over to the plaintiff.

16. On the basis of the averments made in the pleadings and the submissions advanced by the learned senior advocates appearing for the parties at the bar, following points which are relevant for determination are required to be raised and decided at this interlocutory stage:

(1) Whether the suit is time barred?

(2) Whether the plaintiff was ready and willing to perform its part of the contract?

(3) Whether the plaintiff has obtained or attempted to obtain necessary and requisite permission in terms of the agreement to sell?

(4) Whether defendant No.1 has refused to sign applications/documents seeking permission/ transfer from the competent authority put forward by the plaintiff for his signature?

(5) Whether the plaintiff proves that it has paid the remaining amount under the agreement to sell and, if paid, when it is paid?

(6) Whether the agreement to sell is hit by the provisions of section 63 (1) (c) of the Tenancy Act?

(7) Whether the plaintiff proves that possession of the suit land was handed over to it by defendant No.1?

(8) Whether the defendants prove that after obtaining ex-parte ad-interim injunction which was not served upon them for a period of about ten days, the plaintiff has forcibly entered in the suit land and has taken over possession of the suit land from them?

17. In order to answer the aforesaid questions, the registered banakhat dated 6.2.1992 executed between the plaintiff and defendant No.1 is required to be examined, which is at page Nos.16 to 25 of the paper book. On scanning the same, it is evident that it discloses only payment of Rs.15,000/- as bana out of the total consideration of Rs.3,01,290/- According to the plaintiff, it has paid the remaining amount payable under the agreement to sell to defendant No.1. In the entire breadth and length of the pleadings of the plaintiff, it is nowhere stated as to when the remaining amount of consideration was paid by the plaintiff to defendant No.1. In this regard the pleadings of the plaintiff are absolutely vague and the plaintiff has not been able to show when the remaining amount of consideration was paid by it to defendant No.1. It is the case of the plaintiff that it is keeping books of accounts which are audited by Chartered Accountant. If the plaintiff has paid remaining amount of consideration it must have

deducted that amount in its books of accounts. A perusal of the audit report shows that it is nowhere stated that remaining amount of consideration was paid by defendant No.1 to the plaintiff. It is not swallowable or gulpable that the plaintiff has paid such a huge remaining amount of consideration in cash and that too without obtaining any stamped receipt thereof. Therefore, it is clear that the plaintiff has failed to prove that it has paid the remaining amount of consideration to the plaintiff.

18. The plaintiff has also claimed that the possession of the suit land has been handed over to it by defendant No.1. In this connection, the pleadings are absolutely vague and nowhere it is stated as to on which date the possession of the suit land was handed over to the plaintiff. A perusal of the agreement to sell clearly reveals that after obtaining necessary permission as mentioned in the agreement, conveyance is to be executed within a period of nine months. Therefore, the question that arises for

consideration is whether the time is the essence of contract. According to this Court, on the terms of the agreement, when the time of nine months is prescribed after obtaining necessary permission, time is the essence of contract. Therefore, the question that arises now is when the time has started running or which is the date relevant for the purpose of considering the period of nine months. It is an admitted fact that before executing the agreement to sell in favour of the plaintiff by defendant No.1, ULC Act came into existence in the year 1976 which prohibited transfer of urban lands and the ULC Act remained in force upto 30.3.1999. However, under the ULC Act there was a provision for transfer of urban land in certain contingencies. Sections 21 and 22 of the ULC Act covered the said contingencies. If the holder of the urban land or the proposed transferee of the urban land applied to the competent authority for construction of houses for weaker sections of the society then permission could have been obtained. In instant case, it was never attempted

by the plaintiff to obtain such permission from the competent authority for the purpose of construction of houses for the weaker sections of the society when the ULC Act was in force. Therefore, it is clear that during the continuation and enforcement of the ULC Act the plaintiff had not put any effort to obtain necessary permission from the competent authority. There is no dispute that the ULC Act has been repealed with effect from 30.3.1999. Therefore, on repeal of the ULC Act, necessary permission under the ULC Act was not required to be obtained. However, permission under the Tenancy Law, AUDA and NA permission was required to be obtained. There is no evidence to the effect that the plaintiff has ever tried to obtain permission even after 30.3.1999 nor it has prepared any application/document and put it before defendant No.1 for his signature for obtaining necessary permission from such authorities. The plaintiff has awaken from the slumber only in the year 2006 when it came to know that defendant No.1 has transferred the suit

land to defendant No.2. As per the agreement to sell, time of nine months for executing the sale deed on obtaining permission under the ULC Act and other authorities was fixed. As discussed earlier, during the pendency of the ULC Act the plaintiff did not make any attempt to obtain permission from the ULC Authority and even after repealing of the ULC Act, the plaintiff has not made any attempt to obtain permission from other authorities also. Therefore, according to this Court, the suit is time barred.

19. Mr. Mihir Thakore, learned senior advocate of the defendants, has submitted that as per Article 54 of the Limitation Act, 1963, the suit for specific performance of contract has to be filed within three years from the date fixed for the purpose of performance. In instant case, period of nine months is fixed after obtaining permission from ULC authorities. No such permission has been obtained by the plaintiff nor any attempt was made by it to obtain such permission not only from the ULC authorities but

from any other authorities also. Therefore, as per Article 54 of the Limitation Act the suit is time barred.

20. It is sought to be contended by Mr. Soparkar, learned senior advocate of the plaintiff that the suit is not time barred as according to him, date is not fixed and, therefore, the period of three years has to be reckoned from the date when the plaintiff has come to know that defendant No.1 has refused to perform his part of the contract and in instant case the plaintiff came to know that defendant No.1 was not ready and willing to perform his part of the contract when it came to know about the execution of sale deed by defendant No.1 in favour of defendant No.2 in respect of the suit land. Defendant No.1 has never refused to execute the sale deed. There is no express or implied refusal to execute the sale deed in favour of the plaintiff. Therefore, the period of limitation did not begin to run in instant case. It is only when defendant No.1 transferred the suit land in favour of defendant

No.2 by sale deed dated 7.12.2005 that the plaintiff had a notice that defendant No.1 has, by conduct, refused to perform his part of the agreement. Since the plaintiff has filed the suit within ten days thereof, the suit is clearly within the prescribed period of limitation.

21. The aforesaid contention of Mr. Soparkar, learned senior advocate of the plaintiff, is not tenable in view of the fact that there is a specific period of nine months prescribed in the agreement to sell from the date of obtaining the permission under the ULC Act. So far as the judgments relied upon by him in support of the aforesaid proposition of law that the suit is within time are concerned, a perusal of the same clearly shows that they turn on their own facts and the principles laid down therein do not apply to the facts of the present case therefore, detailed reference about the said judgments is not made in this judgment for the sake of brevity. Therefore, the contention of Mr. Soparkar that the suit is not time barred, has no

substance and merit in view of the discussion made in the foregoing paragraphs of this judgment. In view of the aforesaid discussion, according to this Court, the suit filed by the plaintiff is time barred.

22. The plaintiff was never ready and willing to perform his part of the contract as it has not taken or initiated any step to obtain permission from the ULC Authorities. On the date of execution of the agreement to sell the ULC Act was very much in force and the plaintiff had knowledge that it had to obtain necessary permission from the ULC authority. In spite of that it remained silent since 1992 till the ULC Act is repealed and even after the year 1999 also it has not attempted to obtain necessary permission from Tenancy authorities, AUDA or permission for NA use, from competent authority. There is no evidence to the effect that when the plaintiff has prepared the applications/documents for obtaining permission from the competent authorities and placed them before defendant No.1

for his signature.

23. Further, the agreement to sell dated 6.12.1992 discloses payment of bana amount of Rs.15,000/- against the total consideration of Rs.3,01,290/- There is no evidence produced by the plaintiff to show whether it has paid any further amount of consideration to defendant No.1. In absence of any evidence it cannot be presumed that the plaintiff has paid remaining amount of consideration. Therefore, it has to be held that the suit is time barred, the plaintiff was not ready and willing to perform its part of contract nor the plaintiff has obtained or attempted to obtain necessary and requisite permission in terms of the agreement to sell, it has not been proved that defendant No.1 has refused to sign applications/documents seeking permission/transfer from the competent authority put forward by the plaintiff for his signature and the plaintiff has not been able to prove that it has paid the remaining amount of consideration under the agreement to sell.

24. Now this takes this Court to consider the question as to whether the agreement to sell is hit by the provisions of Section 63 (1) (c) of the Tenancy Act. In order to answer the said question, it would be advantageous to refer to Section 63 of the Tenancy Act which reads as under:

> **“63. Transfers to non-agriculturists barred.**-- (1) Save as provided in this Act,--
>
> (a) xxxxxx
>
> (b) xxxxxx
>
> (c)no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein,
>
> shall be valid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally land not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tenant or who is not an agricultural labourer:

> Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage or for such agreement, on such conditions as may be prescribed:
>
> Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other sources exceeds five thousand rupees.”

A plain reading of sub-clause (c) of sub-section (1) of Section 63 of the Tenancy Act puts embargo and as per the said clause, no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein shall be valid in favour of a person who is not an agriculturist. However, by virtue of the first proviso, the Collector or an officer authorised by the State Government in this behalf has power to grant such permission on

such conditions as may be prescribed. In instant case, prior to execution of the agreement to sell no such permission has been sought for by the plaintiff.

25. Mr. Mihir Thakore, learned senior advocate of the defendants, relying upon the aforesaid statutory provisions contained under Section 63 (1) (c) of the Tenancy Act, contended that this provision is statutory. The word used is 'shall' and, therefore, in view of the clear embargo contained in the aforesaid provision, the agreement to sell made in favour of the plaintiff, who is a non-agriculturist, shall not be valid and, therefore, if the said agreement to sell is not valid, it cannot be acted upon and cannot be relied upon as it is inadmissible in evidence. Therefore, even the suit for specific performance of contract is not maintainable on the basis of such an invalid agreement to sell.

26. In counter submission, it is contended by Mr. Soparkar, learned senior advocate of the

plaintiff, that the respondents have, for the first time, in the course of their legal submissions, raised the issue regarding section 63 of the Tenancy Act contending that the Banakhat without the permission of the Collector is illegal and cannot be enforced. According to him, it is not open to the respondents to raise such contention for the first time in Appeal from Order. No such contention was raised before the trial court. The question about the plaintiff being agriculturist is not a mixed question of law and fact and cannot be allowed to be raised in the appeal for the first time. It is contended that such contention was not even raised during the course of oral submissions and came to be included for the first time in the written submissions. The defendants cannot be allowed to raise such issue at such a belated stage. It is also contended by him that Civil Court in view of exclusive jurisdiction of the competent authority constituted under the Tenancy Act cannot be allowed to examine this question. It is settled legal position that as soon as the issue

regarding agriculturist is raised in a Civil Court, the suit is required to be stayed and such issue is required to be decided by the competent authority under the Tenancy Act. Therefore, it is not open even to the Civil Court to give a prima facie finding as to whether the plaintiff is an agriculturist and what are the consequences of the agreement made without the permission of the Collector as provided under section 63 of the Tenancy Act. It is also contended by him that the plaintiff is a company whose entire shareholding is in the hands of agriculturists. All the directors and all the shareholders owning the entire shareholding of the plaintiff company are agriculturists. The sale deed was going to be executed only after the N.A. permission was granted. The agreement to sell itself provide a condition that N.A. permission would be required to be obtained before executing the sale deed. Therefore, corporate veil of the plaintiff company is required to be lifted in the interest of justice to see the inner reality. The plaintiff could not plead the relevant facts

justifying the lifting of the corporate veil because no such contention was raised at the relevant time by the defendants. Therefore, even if the banakhat is made with the plaintiff company, it does not violate, either in letter or spirit, the provision of the Tenancy Act. It is also contended that the permission of the Collector contemplated under section 63 of the Tenancy Act in so far as it relates to banakhat, can be granted retrospectively after entering into the banakhat. The permission contemplated under section 63 has to be a prior permission before the execution of the sale deed, but the same does not apply to banakhat. In the case of banakhat, such permission can be granted after the parties have entered into banakhat also. The very nature of the transaction i.e., banakhat is such that ex post facto permission is required to be read into the provisions of section 63 of the Tenancy Act. It is also contended by him that the permission contemplated under section 63 is merely intended as a regulating and supervisory measure. Such permission can still be achieved if

section 63 in so far it relates to banakhat is read so as to include the ex post facto permission. In this regard he has relied upon the decision of the Supreme Court in the case of Manzoor Ahmed Magray (supra).

27. In Manzoor Ahmed Magray's case (supra), the Supreme Court was dealing with the definition of Section 2 (4) of the Jammu & Kashmir Agrarian Reforms act, 1972, which specifically excluded 'land' which was an orchard on the first day of September, 1971. Sub-section (2) of Section 2 defines 'orchard' to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. While interpreting the said provision, the Supreme Court has further observed that in the case in hand before them, the agreement to sell was executed on 14.7.1971 in respect of an orchard land whereas the said Act came into force on first day of September, 1971 and in the said fact situation of that

case, the said Act was not applicable to the land in dispute. Therefore, according to this Court, the reliance placed by Mr. Soparkar in the judgment in Manzoor Ahmed Magray's case (supra) cannot be made applicable to the facts of the present case.

28. In the case on hand before this Court, Section 63 (1) (c) of the Tenancy Act clearly bars execution of agreement to sell in respect of an agricultural land in favour of a non-agriculturist and when there is a specific bar, according to this Court, any agreement to sell executed in favour of a non-agriculturist is void ab-initio. When the agreement to sell itself is void ab-initio, it cannot be enforced in a court of law and therefore, on the basis of the said document, no specific performance can be granted.

29. In aforesaid backdrop of statutory provisions contained under Section 63 (1) (c) of the Tenancy Act, according to this Court, the contentions of Mr. Soparkar that the issue

regarding prohibition of sale of agricultural land under Section 63 of the Tenancy Act is raised for the first time in this Appeal from Order, the plaintiff being agriculturist or not is a mixed question of law and fact and the civil court cannot examine this question and also the plaintiff company being run by agriculturists and all the directors and shareholders of the plaintiff company are agriculturists and the permission under Section 63 of the Tenancy Act can be obtained ex post facto, have no substance and merit at all and, therefore, they are to be repelled and accordingly those contentions are repelled.

30. At the cost of repetition, be it stated that clause (c) of sub-section (1) of Section 63 of the Tenancy Act is mandatory in nature and as per the said clause, no sale, gift, exchange, lease or mortgage or agreement in respect of an agricultural land shall be valid in favour of a person who is not an agriculturist. Admittedly, in instant case, the plaintiff has never claimed

that it is an agriculturist in terms of the definition of 'agriculturist' defined in sub-section (2) of Section 2 of the Tenancy Act. As per the said definition, 'agriculturist' means a person who cultivates land personally. There is no manner of doubt that any person or any company registered under the Partnership Act or under the Indian Companies Act can be an 'agriculturist' if it cultivates the land personally.

31. In view of the aforesaid discussion, according to this Court, the agreement to sell executed between the plaintiff and defendant No.1 for which the specific performance is sought for is hit by Section 63 (1) (c) of the Tenancy Act and, therefore, it is void, ab-initio for which no specific performance of contract can be granted. Therefore, it has to be held that the agreement to sell is hit by the provisions of Section 63 (1) (c) of the Tenancy Act.

32. Now the next question which comes for

consideration of this Court is whether on the date of filing of the suit who was in possession, either the plaintiff was in possession or defendant No.1/2 was in possession of the suit land.

33. In this connection, detailed reference on various documents produced by both the parties is required to be made in this judgment.

(i) All receipts for land revenue paid for the period from 1974 to 1991 in respect of the suit land were produced by defendant No.1 in the suit and this clearly shows that the land revenue all throughout from 1974 onwards was being paid by defendant No.1. This is evident from Ex.37/1 – pages 332 to 336 of the paper book.

(ii) Form No.7/12 for the period from 1990-91 to 1998-99 clearly shows possession of the suit land with defendant No.1 and the suit land is shown as agricultural land. This is evident from Ex.37/9 at page Nos.372-374 of the paper book.

(iii) Thereafter from the year 1999-2005 also Form No.7/12 shows possession of the suit land with defendant No.1 and the land is shown as agricultural land. This is established vide Ex.3/9 at page 55 of the paper book.

(iv) On 30.11.1991, AUDA granted permission to defendant No.1 for construction of Farm House on the land bearing Survey No.86/1/2 of village Gota, Taluka Dascroi and the sanctioned plan clearly shows the proposed construction having circular rooms. A perusal of Exhs.3/3 to 3/5 at page Nos. 27 to 31 makes the above facts crystal clear.

(v) On 3.1.1994 an order was passed by the Deputy Collector in the matter between the Gujarat State and defendant No.1, whereby he withdrew the notice issued on 19.3.1993 by the Mamlatdar on the ground that defendant No.1 has committed breach of the conditions by using the agricultural land for hotel. The Deputy Collector

held that the land in fact was being used for agriculture and the construction is of the farm house only. The plaintiff has placed reliance on this notice for the purpose of contending that the plaintiff's Managing Director had remained present at the time of hearing before the Deputy Collector. While it is true that on one occasion Pravinbhai J. Patel had remained present and had sought time, on the date of hearing it was defendant No.1 himself who not only remained present but gave his written submissions. This letter does not in any manner support the plea of the plaintiff that the land was in their possession. It would only indicate that Pravinbhai J Patel, the Manging Director of the plaintiff, who had entered into an agreement to sell the suit land with defendant No.1 had appeared on one occasion on behalf of defendant No.1 which would be inconformity with the obligation to obtain all permissions. But it also indicates that at the actual hearing defendant No.1 had remained present and the possession is in the name of defendant No.1. This fact is very

much established from Ex.3/6 which is at page Nos.32-33 of the paper book.

(vi) All receipts for the land revenue paid in respect of the suit land for the period of 1993-1994 were produced by defendant No.1 in the suit which are at Ex.37/1 at page Nos.337-344 of the paper book, and they clearly show that the land revenue all throughout from 1974 onwards was being paid by defendant No.1.

(vii) Annual reports of the plaintiff company for the period from 1995-96 to 1999-2000 are produced by the plaintiff for the purpose of showing that the plaintiff has expended around Rs.75 lacs on construction of Club House. They are at Ex.35/3 to 35/10 at page 254 to 289 of the paper book. It appears from the Annual report (page 271) that around Rs.75 lacs has been expended in construction of a building. However, there is nothing in any Annual Report to show as to which building is being referred to therein. The report also indicates that no employee was

employed and no business has ever commenced till 2000.

(viii) A letter dated 29.12.1997 (Ex.3/7 at page 34 of the paper book) was addressed by Pravinbhai J. Patel to the Commissioner of Income-tax under Voluntary Disclosure of Income Scheme, 1997 showing that Rs.40 lacs has been purportedly spent for a scheme of Country Castle Resorts Private Limited. There is no indication regarding which construction the purported money was spent. The letter is not bearing any signature. The Certificate of Deduction dated 6.6.1998 (Ex.3/8 at page 35 of the paper book) is of Country Castle Resorts Private Limited, having address at Isanpur and not at Gota, while the Voluntary Disclosure of Income Scheme is of Pravinbhai J. Patel. There is nothing to show what money was spent on the alleged construction claimed to have been made by the plaintiff.

(ix) On 18.4.1998 an estimate for connection of power given by Gujarat Electricity Board to

defendant No.1 was made which is at Ex.25/12 at page 134 of the paper book. This document shows that power was demanded by defendant No.1 indicating that defendant No.1 was in possession, otherwise this document would not have been produced by defendant No.1.

(x) An inspection report dated 16.11.1998 in respect of inspection of the premises at Gota by the Gujarat Electricity Board is produced on record at Ex.25/12 which is at page 137 of the paper book. The name of consumer mentioned in the report is Patel Natvarlal Trikamlal and Patel Vinod, nephew of defendant No.1 was present. The possession of the document with defendant No.1 clearly shows that defendant No.1 was in possession of the premises.

(xi) On 26.6.1999 a Panchnama was drawn in Civil Suit No.369 of 1999 in respect of the suit premises in dispute between defendant No.1 and his nephew and it clearly indicates that the property was known as N.T. Patel Farm House and

that the possession was of defendant No.1. The said panchnama is produced at Ex.37/9 at page 382-389 of the paper book.

(xii) All receipts for land revenue paid in respect of the suit land for the period from 2000-2006 are produced by defendant No.1 in the suit at Ex.37/1 which are at page 345-351 of the paper book. They clearly show that the land revenue all throughout from 1974 onwards was being paid by defendant No.1.

(xiii) Panchayat Tax receipts for the years 1999-2000 to 2003-04 in the name of defendant No.1 Natvarbhai Trikambhai were produced by defendant No.1 showing that defendant No.1 was in possession of the suit land and the said receipts are at Ex.25/1, at page 110-114.

(xiv) The plaintiff has produced invitation card in respect of the marriage of Pravinbhai's daughter having taken place in the suit land, which is dated 29.1.2000 and the same is produced

at page 290-291 of the paper book. This letter only indicates that the premises were being let out for functions. It is not indicative of possession. More so in view of certain subsequent documents of similar nature in respect of which entertainment tax was paid.

(xv) On 5.7.2000 an inspection report was issued by Gujarat Electricity Board, a copy of which has been received by Pankajbhai N. Patel and this shows that Pankajbhai was present at the time of inspection and said Pankajbhai Patel is the only son of defendant No.1. The said inspection report is at Ex.25/12 which is at page 138 of the paper book.

(xvi) The Gujarat Electricity Board has issued another inspection report dated 27.2.2001 which is at Ex.25/12, page 139 of the paper book, and a copy of the same has been received by Pankajbhai N Patel showing that Pankajbhai Patel was present at the time of inspection. Pankajbhai Patel is the only son of defendant No.1 which fact is also

stated in the inspection report. The time of inspection was stated to be 14.45 to 15.30 hours. On 4.3.2002 Natvarbhai Patel, defendant No.1 addressed a letter to Assistant Town Planner, AUDA for regularisation, which is at Ex.25/13 at page 150 of the paper book and this letter shows that defendant No.1 is in possession.

(xvii) Similarly, on 25.2.2003 also a letter was written by Natvarbhai Patel, defendant No.1 to Assistant Town Planner, AUDA for regularisation, which is at Ex.25/14 at page 151-152 of the paper book. This letter also shows that defendant No.1 is in possession. Again on 18.6.2003 Natvarbhai Patel, defendant No.1 wrote a letter to Assistant Town Planner, AUDA for regularisation which is at Ex.25/15 at page 153-154. This letter also shows that defendant No.1 is in possession.

(xviii) On 18.6.2003 objection was raised by Patel Natvarlal Trikamlal against revised assessment of Panchayat tax and a letter was sent

to Deputy District Development Officer, Taluka Development Officer, Sarpanch, Gota Gram Panchayat, Talati cum Mantri, Gota Gram Panchayat, which is at Ex.25/2 at page 116-119 and this also shows that it is Natvarlal Patel who objected to the revised assessment.

(xix) On 17.11.2003 an inspection was made by Gujarat Electricity Board at 03.00 P.M. as per inspection report at Ex.25/12 at page 140 and at the time of inspection Pankajbhai N Patel, son of the consumer, was present and this clearly establishes that the possession of the suit land was with defendant No.1 on 17.11.2003.

(xx) A bill dated 10.1.2004 for Rs.2,78,642/- for theft of electricity was served upon Patel Natvarbhai Trikambhai which is at Ex.25/12, at page 135. At this stage it is pertinent to highlight certain connected documents which are at pages 143, 145 and 147 of the paper book. They are order of the Appellate Committee dated 5.4.2005 (page 145) which bears the signature of

Pankajbhai N. Patel agreeing to pay a total sum of Rs.1,85,760/- as well as receipts dated 29.4.2005 for Rs.61,707/- (page 143), 30.5.2005 for Rs.40,000/- (page 147) and 7.6.2005 for Rs.54,923/- (page 147). It is pertinent to highlight the fact that all these receipts and receipt including that of 7.6.2005 and the subsequent receipt of September 2005 are all produced by defendant No.1 and they clearly establish that defendant No.1 was paying the electricity charges all throughout which would not have been there had the plaintiff been in possession.

(xxi) The invitation card in respect of the marriage of Renu, daughter of Dashrathbhai, who is the brother of Pravinbhai, dated 27.1.2004 is produced on record by the plaintiff purportedly to show their possession. However, for the said function, service tax was paid in respect of which receipt is produced by defendant No.1. The said documents are at Ex.35/13, 35/14 and 37/7 and they are at page 292, 293 and 359 of the

paper book.

(xxii) On 19.2.2004 a search was conducted by Service Tax Department at the suit land and the panchnama prepared at that time clearly mentions the presence of Pankajbhai Natvarbhai Patel, who has stated that they are charging Rs.25,000/- per function for giving the suit land, namely, N.T. Patel Farm House. The said document is produced at Ex.37/8 at page 363-364 of the paper book. The document indisputably establishes the possession of defendant No.1 and he is carrying on the business of providing the suit premises for functions and charging rental for such function on which he would be liable to pay service tax. Other relevant service tax documents are produced at Ex.25/5, 25/6, 25/7, 25/8, 25/9, 25/10 and 25/11 (page 123-132) being challans for payment of service tax and grant of Service Tax Code number.

(xxiii) Resolution of Gota Gram Panchayat dated 17.3.2004 showing that Pravinbhai Patel, Managing

Director of Country Castle Resort Private Limited had made an application to Gota Gram Panchayat that the name of Country Castle Resort Private Limited should be put on record and it was resolved to obtain the reply of Natvarbhai Trikambhai Patel. This is evident from Ex.37/4 and 37/5 which are at pages 354 and 355 of the paper book. Subsequent thereto on 30.4.2004 a resolution was passed recording that objections were filed by Natvarbhai Trikambhai Patel and in view of such objections, no further action is required to be taken. This is evident from Ex.37/4 and Ex.35/5 at pages 354A and 354B of the paper book.

(xxiv) The inspection report of the Gujarat Electricity Board dated 29.4.2004 prepared at 10.30 P.M. shows that Pankajbhai Natvarlal Patel, son of defendant No.1, was present at the time of inspection. This document is at Ex.25/12 at page 141 of the paper book.

(xxv) Invitation card in respect of the marriage

of Birju, daughter of Pravinbhai, held on 6/7.12.2004 is produced at Ex.35/15, 35/16 and 35/17. This document is required to be read with the receipt issued for the said function in respect of the service tax which is produced at Ex.37/7 at page 360-361 of the paper book.

(xxvi) The Gujarat Electricity Board carried out an inspection on 3.2.2005 at 10.30 A.M. and the inspection report shows that Pankajbhai Natvarlal Patel, son of defendant No.1 was present at the time of inspection and this shows that defendant No.1 was in possession. The said inspection report is produced at Ex.25/12 which is at page 142 of the paper book.

(xxvii) The Income tax return dated 31.3.2005 of Natvarbhai Trikambhai Patel shows the income from N.T. Patel Farm House. This document is produced at Ex.37/3 at page 352-354 of the paper book.

(xxviii) Order passed by the District Panchayat

in Appeal cancelling the assessment made in respect of Panchayat Tax served on defendant No.1 at Gota received by defendant No.1 on 1.10.2005 and produced by defendant No.1 and not by the plaintiff at Ex.25/19, page 172 of the paper book, shows that defendant No.1 was in possession even on 1.10.2005, otherwise this document would have come from the custody of the plaintiff.

34. A critical analysis of the afore-mentioned documents unequivocally suggests that defendant No.1 was in possession of the suit land till he executed the sale deed in favour of defendant No.2 on 8.12.2005.

35. It is contended by Mr. Soparkar, learned Senior Advocate of the plaintiff, that the plaintiff has spent around Rs.47 lacs on the suit land which was in multiple to the consideration paid by the plaintiff to defendant No.1 and no reasonable and prudent man would spend such a huge amount unless possession of the land is not

handed over to him. In this regard the plaintiff has placed reliance on documents Ex.35/3 to 35/10 which are at page Nos.254 to 289 of the paper book. A perusal of the said documents shows that they are annual reports of the plaintiff company showing that the plaintiff has expended around Rs.75 lacs on construction of Club House.

It appears from the annual reports that around Rs.75 lacs has been expended in construction of a building. However, there is nothing in the annual reports to show which building is being referred to therein and which building has been constructed by spending the said amount. Therefore, no reliance can be placed on the said annual reports to come to the conclusion that the plaintiff has spent Rs.75 lacs for the construction of a building on the suit land and the plaintiff is in possession of the suit land.

It is also the case of the plaintiff that on

behalf of the plaintiff Pravinbhai Patel has made voluntary disclosure under the Voluntary Disclosure Scheme of the Income Tax Department in 1997 before the Commissioner of Income tax to show that Rs.40 lacs purportedly spent for a scheme of Country Castle Resorts Private Limited. The said documents are produced at Ex.3/7 and 3/8 at page 34 and 35 of the paper book. A perusal of the said documents shows that there is no indication regarding which construction the purported money was spent. The letter is not bearing any signature and the certificate of deduction dated 6.6.1998 is of Country Castle Resorts Private Limited having address at Isanpur and not at Gota while the Voluntary Disclosure of Income Scheme is of Pravinbhai Patel. <u>There is nothing to show what money was spent on the alleged construction claimed to have been made by the plaintiff.</u>

36. As against this, there is voluminous documents produced by the defendants to show that from the year 1974 onwards till the execution of

the sale deed in favour of defendant No.2, defendant No.1 used to pay the land revenue in respect of the suit land. The property card in respect of the suit land also stood in his name. Even after execution of the agreement to sale in the year 1994 also the Deputy Collector issued a notice to defendant No.1 on the ground that defendant No.1 committed breach by using agricultural land for use of hotel. The Deputy Collector held that the land in fact being used for agriculture and the construction is only a farm house. The plaintiff has placed reliance on this notice for the purpose of contending that the Managing Director of the plaintiff company had remained present at the time of hearing before the Deputy Collector. This letter does not in any manner support the plea of the plaintiff that the suit land was in its possession. It would only suggest that Pravinbhai Patel, Managing Director of the plaintiff company, who has entered into an agreement to sell with respect to the suit land , had appeared on one occasion on behalf of defendant No.1 before the

Deputy Collector. From the year 1993 onwards also the land revenue has been paid by defendant No.1. The Panchayat Tax was also paid by defendant No.1. The plaintiff has produced invitation card of the marriage of Pravinbhai's daughter having taken place in the suit premises. This document only indicates that the premises were being let out for such functions. It is not indicative pf possession. These documents are conclusive proof that defendant No.1 was in possession of the suit land all throughout. On 4.3.2002 a letter was addressed by Natvarbhai Patel, defendant No.1 to Assistant Town Planner, AUDA for regularization which is at Ex.25/13 at page 150 of the paper book. This letter unequivocally suggests that defendant No.1 was in possession even on 4.3.2002. Subsequently also on 25.2.2003 a letter was written by Natvarbhai Patel, defendant No.1 to Assistant Town Planner, AUDA for regularization which is at Ex.25/14 at page 151 and 152 of the paper book. Again on 18.6.2003 Natvarbhai Patel, defendant No.1 had written a letter to Assistant Town Planner, AUDA for

regularization. Similarly, on 18.6.2003 objection was raised by Natvarlal Patel against the revised assessment of Panchayat tax and a letter was sent to Deputy District development Officer, Taluka Development Officer, Sarpanch, Gota Gram Panchayat, Talati cum mantri, Gota gram Panchayat which is at Ex.25/2 at page 116-119 of the paper book which also shows that defendant No.1 was in possession of the suit land on 18.6.2003 also. It is also the case of defendant No.1 that he has paid the bills for theft of electricity served on Natvarbhai Trikambhai Patel on 10.1.2004 which is at Ex.25/12 at page 135 of the paper book. Pursuant to the said bill defendant No.1 has paid Rs.2,78,642/- This letter shows that defendant No.1 was in possession of the suit land all throughout. Marriage function of Renu, daughter of Dashrathbhai, who is brother of Pravinbhai, was arranged in the suit premises on 27.1.2004 and for that function service tax was collected by defendant No.1 and the receipt was also produced by him. If defendant No.1 would not have been in possession of the suit land, he would not

have collected service tax from Pravinbhai. In this connection, Service Tax Department had made a search in the suit premises on 19.2.2004 and a panchnama was prepared which clearly mentions the presence of Pankajbhai Natvarbhai Patel who has stated that they are charging Rs.25,000/- per function for giving the suit premises namely NT Patel Farm House for such functions. These are the documents which would clearly and unequivocally establish that defendant No.1 was in possession of the suit land all throughout. This court has discussed in details with regard to other documents in the foregoing paragraphs of this judgment which would show that defendant No.1 was in possession of the suit land till the sale deed in favour of defendant No.2 was executed.

37. Besides this, the Court Commissioner's report also indicates that defendant No.2 was in possession of the suit land because the report shows that at the time when the Court Commissioner entered in the suit land on

27.12.2005 defendant No.2 opened the door. The said report is at page 74 of the paper book. The said report clearly discloses that there was a Board of D.H. Patel Farm House, Proprietor Deval Patel as well as on the internal gate D.H. Patel Farm House is written above the gate. The door of the room was opened by defendant No.2 at the time of preparing panchnama. There is no reason to disbelieve that at the time of preparing panchnama of the suit land defendant No.2 by virtue of the sale deed executed in her favour was in possession of the suit land. In the said panchnama it is also mentioned under the Heading “Public Caution” that the suit land is in possession of Pravinbhai Jasubhai Patel, Dashrathbhai Jasubhai Patel and Hitesh Anubhai Patel Directors of Country Castle Resorts Private Limited and they are independent owners and occupiers of the suit land. Therefore nobody should enter in the suit land without their prior permission. This Court fails to understand how the Country Castle Resorts Private Limited becomes owner without sale deed being executed in

their favour. Therefore there is a reason to believe that the plaintiff was never in possession of the suit land.

38. On over all view of the matter, according to this Court, the plaintiff was never in possession of the suit land and therefore the learned trial Judge has very rightly held that the plaintiff's possession on the suit land is a disputed one and not legal one.

39. The sum and substance of the aforesaid discussion unequivocally suggests that the plaintiff was never in possession of the suit land and it can be summarized as under:

(i) The agreement to sell dated 6.2.1992 discloses only payment of Rs.15,000/- as bana amount against the total consideration payable of Rs.3,01,290/- There is no evidence produced by the plaintiff to show, if any further consideration has been paid by the plaintiff to defendant No.1. In absence of any further

consideration, no reasonable person would hand over possession of the premises to the plaintiff against a meagre consideration of approximately 5%.

(ii) The agreement to sell no where discloses that the possession has been handed over by defendant No.1 to the plaintiff, while executing the agreement to sell. There is no other document executed by defendant No.1 in favour of the plaintiff to show the actual handing over of the possession by defendant No.1 to the plaintiff.

(iii) The plaintiff, while claiming that it has been handed over the possession of the property, has not made any averment as on which date the possession has been allegedly handed over to the plaintiff. In fact the plaintiff's pleadings, in respect of possession, are completely false, as it contradicts itself in Paragraph 5 (A) where it says that it has only paid Rs.15,000/- to defendant No.1 and Paragraph -6, where the plaintiff says that the plaintiff has paid the

complete balance consideration and the possession was handed over to it without giving any details of either of the two.

(iv)All inspection reports of Gujarat Electricity Board not only clearly establish that the electricity connection is taken in the name of defendant No.1, but also on each occasion son of defendant No.1 was present in the premises. This clearly establishes the possession of defendant No.1 from 1998 to 3.2.2005 (Refer Ex.25/12, pages 134, 138, 139, 140 and 142 of the paper book). Since these documents are produced by defendant No.1, they clearly establish that the copies were all with defendant No.1 having been handed over to the son of defendant No.1 again establishing possession of defendant No.1.

(v) All Electricity Bills including Electricity Bill of theft has been paid by defendant No.1 and defendant No.1 is in possession of all the original receipts, copies whereof produced by defendant No.1 again establishing that defendant

No.1 is in possession of the suit land (Refer Ex.25/12, page 135, 143, 145 and 147 of the paper book).

(vi)All revenue receipts from 1974 to 2006 are produced by defendant No.1 and paid by defendant No.1 again showing that defendant No.1 was in possession of the suit land all throughout (Refer Ex.37/1, page 332-351 of the paper book).

(vii) Panchayat Tax receipts from 1999 to 2003 and 2005-06 also produced by defendant No.1 showing that defendant No.1 was in possession of the suit premises (Refer Ex.25/1, page 100-114 of the paper book). Objection against revised assessment of Panchayat tax also raised by defendant No.1 and Appeal decided in favour of defendant No.1 (Refer Ex.25/2 and 25/19, pages 116, 119 and 172 of the paper book).

(viii) Search conducted by the Service Tax Department in the premises on 19.2.2004. The Panchnama clearly mentions the presence of

Pankajbhai Natvarbhai Patel, son of defendant No.1 again clearly establishing possession of defendant No.1. (Refer Ex.37/8, page 363-364 and Ex.25/5 to 25/11, page 123-132 of the paper book).

(ix)Panchnama in Civil Suit No.369 of 1999 in a dispute between defendant No.1 and his nephew clearly indicates N.T. Patel Farm House being run in the premises and the possession of defendant No.1 (Refer Ex.37/9, page 382-389).

(x) Income tax return filed by defendant No.1 discloses income from N.T. Patel Farm House again establishing that they were using the said property for giving on rent for functions (Refer Ex.37/3, page 352-354 of the paper book).

(xi)The ULC Act was repealed in 1999 till then under Section 5 of the ULC Act the question of handing over possession would not arise because that was prohibited by law. There is no document or evidence to show possession having been handed

over post 31.3.1999. In fact, possession of defendant No.1 has been clearly established in the inspection report of 3.2.2005.

(xii) It is evident from the fact that the plaintiff did not consider it appropriate to get panchnama done immediately after obtaining the ad-interim injunction nor did the plaintiff serve the ad-interim injunction on defendant Nos.1 and 2 for nine days clearly establishes that the defendants were in possession and the plaintiff under the cover of the injunction order wanted to wrest part of the possession of the suit land and then get appropriate panchnama to support their order. Even there they have failed because the locks to the rooms were opened by defendant No.2.

40. From the above, it would be clear that the plaintiff was never in possession of the suit land and defendant No.1 was in possession of the suit land from the very beginning and after execution of sale deed in favour of defendant No.2, she has come in possession of the suit

land.

41. In view of the above discussion, there is a reason to believe that under the guise of the order of status quo granted by the trial court, while preparing panchnama by the Court Commissioner or prior thereto the plaintiff has entered in the suit land forcibly with a view to create evidence of possession and, therefore, the question that would arise for consideration of this Court that when the plaintiff has forcibly obtained the possession of the suit land by using muscle power, can the possession of the suit land be restored to defendant No.2.

42. There is much hue and cry raised by the learned senior advocates appearing for the parties so far as this question is concerned. According to Mr. Soparkar, learned senior advocate of the plaintiff, the request for restitution/restoration of possession of the suit land to defendants cannot be entertained at this stage. It is contended by him that such request

is made on the strength of Section 151 of the Code. Defendants have not relied upon Section 144 of the Code because Section 144 in terms does not apply to the present situation. Defendant No.1 has not made any application to the trial court for restitution and restoration of possession. Such request was made orally during the course of submissions. But, the trial court has not granted such request observing that the possession of the property on the date of the suit is a matter of serious factual dispute. Such refusal of restoration by way of restitution is not appealable order at all. No appeal lies under Order 43 Rule 1 (r) of the Code against such refusal. But even independently of the question whether such appeal lies or not, there can be no question of restitution of possession to defendant No.1 at this stage in view of the state of evidence before the trial court. Defendant No.1 has not established that prima facie he was in possession of the club. Therefore, according to Mr. Soparkar, no restitution or restoration of possession of the suit land can be ordered at

this stage.

43. As against this, Mr. Thakore, learned senior advocate of the defendants, submitted that defendants' possession of the suit land is clearly established and once it is established that defendant No.2 was in possession of the suit land or in the alternative that the plaintiff was not able to establish that it was in possession of the suit land, it becomes evident that the possession was disturbed after obtaining orders from the trial court on 17.12.2005, on 27.12.2005. Obtaining ex-parte injunction when the same was not necessary, not taking orders in respect of service of plaint and documents within 24 hours as is mandatorily required under the proviso to Order 39 Rule 3 of the Code, not making payment of process fees for nine days and postponing both, the service of injunction and the local inspection (commissioner's report) already ordered for ten days clearly is an abuse of the process of the Court by the plaintiff and it is necessary in the facts and circumstances of

the case that the plaintiff should be directed to restore status quo ante i.e., to restore the possession of the defendants. It is further contended by him that an Appeal from Order is continuation of proceedings before the trial court and being continuation of the proceedings before the trial court, the High Court can pass all appropriate orders which the trial court have passed to restore the status quo ante. This power is inherent power available to all Courts to do justice and no technicalities can or should come in the way of the Court from doing what is necessary to be done, particularly when the plaintiff has abused the process of the Court. No mercy can be shown to a person who comes with unclean hands and abuses the process of the Court.

44. In view of the rival submissions and more particularly when this Court has held that the defendants were in possession of the suit land and the plaintiff was never in possession of the suit land and the plaintiff has forcibly entered

in the possession of the suit land after obtaining the ad-interim injunction from the trial court, the next question that requires consideration of this Court is whether status quo ante i.e., restoration of possession in favour of the defendants can be ordered.

45. In the case of Kavita Trehan (supra), the Supreme Court has held as under:

> *"13.The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment.'Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. The law of quasi-contract is "that part of restitution which stems from the common indebitatus accounts for money had and received and for money paid, and from quantum meruit and quantum valebat claims." (See 'The Law of Restitution' – Goff & Jones, 4th Edn. Page 3). Halsbury's Law of England, 4th Edn. Page 434 states:*
>
> > *"Common Law. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.*
> >
> > *For historical reasons, quasi*

contract has traditionally been treated as part of, or together with, the law of contract. Yet independently, equity has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed "restitution"."

Recently the House of Lords had occasion to examine some of these principles in Woolwich Equitable Building Society v. Inland Revenue Commissioners, 1993 AC 70.

14. In regard to the law of restoration of loss or damage caused pursuant to judicial orders, the Privy Council in Alexander Rodger Charles Carnie v. The Comptoir D'Escompte De Paris, (1869-71) 3 AC 465 at 475 stated:

"... one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

In Jai Berham v. Kedar Nath Marwari, AIR 1922 PC 269 at 271, the Judicial Committee referring to the above passage with approval added:

"It is the duty of the Court under S.144 of the Civil Procedure Code to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed."

Nor indeed does this duty or jurisdiction arise merely under the said

section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

In Binayak Swain v. Ramesh Chandra Panigrahi, (1966) 3 SCR 24 at 27: (AIR 1966 SC 948 at p.950), this Court stated the principle thus:

".....The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from. ....."

15. Section 144,C.P.C. incorporates only a part of the general law of restitution. It is not exhaustive. (See Gangadhar v. Raghubar Dayal, AIR 1975 All 102 (FB) and State of Andhra Pradesh v. M/s. Manickchand Jeevraj & Co., Bombay, AIR 1973 Andh. Pr. 27).

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of S.144. Section 144 opens with the words "where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose ....". The instant case may not

strictly fall within the terms of S.144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

We have considered this submission of Sri Grover relying on Sakamma v. Eregowda, (1974) 2 Kant. LJ 357, that the mere fact that the suit for permanent injunction was dismissed resulting in the vacation of the interim order of injunction granted during its pendency, would not entitle the successful defendant to seek restitution under S.144, C.P.C. That principle has no application in this case. In the case before us the injunction granted by the learned Senior Sub-Judge, Chandigarh, was not merely negative in terms interdicting interference from the respondent with the custody of the goods by the appellants; it went much further and expressly enabled the appellants to sell the goods. Pursuant to this order, the appellants disturbed the status quo as on the date of the suit and sold away respondent's goods and converted them into money. The High Court while declining the prayer for payment of the sale proceeds to the respondent, however, sought to relegate the parties to the extent practicable, to the same position as obtained on the date of the suit. This the High Court did by directing furnishment of security to the extent of the value of th goods sold away under the cover of the interlocutory order. That an appeal filed against the said interlocutory order was withdrawn, does not, in our opinion, make any difference. Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset th status quo, was required to be undone to the extent possible. It is unfortunate that the learned Sub-Judge, Ist Class made an order which, we think, ought not to have been made. If the Trial Judge felt that it was in the interest of justice that the goods required to be disposed of, he should have ordered the sale by or under the supervision of a Commissioner of the court

ensuring that the sale proceeds were under the court's control. We are constrained to observe that the order of the learned Sub-Judge, Ist Class, failed to have due regard to the need to protect the interests of the opposite party and, to say the least, an improper order was passed. The ex-parte order granted by the learned Sub-Judge, Ist Class was not of mere negative import but virtually enabled and authorised the appellants to sell away respondent's goods of which appellants were merely clearing and forwarding agents. This permission to sell implicit in the form of the order enable the appellants to purport to convey, respecting the goods, a better title than what appellants themselves had. That such a thing was achieved by an ex-parte order, tends to shake litigants' faith in the judicial process. The learned Sub-Judge, Ist Class ought not to have made an ex-parte order which occasioned serious prejudice and loss to the respondent. On the administrative side, the High Court may have to look into into the propriety of the conduct of the learned Sub-Judge, Ist Class, in this case.

16. In these facts and circumstances, what the learned Single Judge of the High court did, which has since been approved by the Division Bench, is both good-sense and good law. There are, in our opinion, no legal infirmities in the orders under appeal. The appeals do not call for interference. Both the appeals are, accordingly, dismissed with costs. The costs payable to the respondent are quantified at Rs.25,000/-"

46. In South Eastern Coalfields' Case (supra), the Supreme Court has observed as under:

"24. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in

execution of decree or order of the Court or in direct consequence of a decree or other (See Zafar Khan and Ors. v. Board of Revenue, UP and Ors. AIR 1985 SC 39). In law, the term 'restitution' is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another, (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P.1315). The Law of Contracts by John D. Calamari and Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done. "Often, the result in either meaning of the term would be the same. ..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed." The principle of restitution has been statutorily recognized in S.144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C., speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding

compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

25. Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from S.144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwadi (1922) 49 I. A. 351, their Lordships of the Privy Council said: "It is the duty of the Court under S.144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. Cairns, L.C. said in Rodger v. Comptior d'Escompte de Paris, (1871) L.R. 3 P.C.: "One

of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the Case." This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, A.A. Nadar v. S.P. Rathinasami (1971) MLJ 220. In the exercise of such inherent power the Courts have applied the principles of restitution of myriad situations not strictly falling within the terms of S.144.

26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been

had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation."

47. In Dhirajlal Vithldas Kavaiya's case (supra), this Court has held as under:

"As per settled law, if a party is dispossessed after an order of interim relief is granted in his favour by a competent Court, the chapter cannot be said to be

> closed. If a person is dispossessed by wilfully and intentionally violating an order of injunction, it is not only the right but the duty of the Court to undo wrong done to the party in whose favour it has passed such order. The exercise of inherent powers under Sec.151 of the Code are based on doctrine that no party can be allowed to take undue advantage of his own wrong. A party who has committed illegality cannot be allowed to reap fruits of his unlawful action and the Court must intervene by preventing him from doing so as also by protecting an innocent party and by safeguarding his interests. The provisions of Order 39 Rule 2A of the Code are not an answer in such cases to deprive a party to legitimate benefits to which he is otherwise entitled. The person who has violated the order of the Court may also be held liable for disobeyance of such order and may be punished but that will not be a ground to deny an appropriate relief to the party to whom injustice is done. If the Court does not exercise inherent powers in such cases and remains a silent spectator, it would undermine the very basis of the rule of law."

48. In Mir Bazlay Ali's case (supra), Andhra Pradesh High Court, after relying upon the judgment in Kavita Trehan's case (supra), has held that the Court can order restoration of possession though not under Section 144 of the Code but under Section 151 of the Code.

49. Applying the principle laid down by the

Supreme Court, this Court as well as the Andhra Pradesh High Court in the above referred to judgments to the facts of the present case, there is no manner of doubt that the Court can order restoration of possession though not under Section 144 of the Code but under Section 151 of the Code. If the Court does not exercise inherent powers in such cases and remains a silent spectator, it would undermine the very basis of the rule of law.

50. So far as the judgment in of V. Hucheswaran's case (supra) relied upon by Mr. Soparkar on the point of restitution is concerned, the same cannot be made applicable to the facts of instant case. In the said case, the Supreme court was examining the principle of res-judicata in the application for restitution filed by the parties. In the said case, SLP filed against the revisional order alleged to have caused prejudice to the appellant has been withdrawn. Therefore, in the said fact situation, the Supreme Court has ruled that question of

restitution to possession prior to passing of the said revisional order cannot arise. The said revisional order having become final with the withdrawal of the SLP, it was no longer open to the appellant to pray for restitution and, therefore, the Supreme Court held that the principle of res-judicata is applicable to the application field by the parties seeking restitution. In instant case, proceedings are still pending. This Court is examining the Appeals from Order filed by both the parties against the interlocutory order passed by the learned trial Judge wherein though the learned trial Judge has held that the plaintiff's possession is a disputed one and not legal one, he has not exercised the powers conferred under Section 151 of the Code though oral request for restoration of possession ante was made and therefore this Court while examining the Appeals from Order which is continuation of proceedings pending before the trial court, can definitely pass the order of restoration of possession in favour of defendant No.2.

51. So far as the powers of the Court under Section 151 of the Code is concerned, there is no manner of doubt that the Code preserves inherent powers of all courts to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. They are to be exercised *ex debito justitiae.* It is in the discretion of the court to exercise such powers. No party has a right to insist on the court exercising its inherent jurisdiction. This jurisdiction is to be exercised by the court in very exceptional circumstances for which the Code provides no procedure. An essential distinction between jurisdiction of the court and exercise of inherent powers cannot be forgotten or overlooked. Section 151 of the Code applies in exercising inherent powers by the court when it has jurisdiction over the proceeding before the court. No doubt every court is deemed to possess inherent powers as a necessary corollary to do the right and undo the wrong in the course of administration of justice. Section 151 of the

Code does not confer jurisdiction on the court. It only saves and reserves inherent powers in the court once it has been held that the court has jurisdiction in the matter.

52. Some of the judgments lying down the aforesaid proposition of law delivered by the Supreme Court are as under:

(i) In the case of Manohar Lal v. Seth Hiralal, AIR 1962 SC 527, it was observed that the inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and, therefore, must be held that the court is free to exercise them for the purposes mentioned in Section 151 (for the ends of justice or to prevent the abuse of process of the court) when the exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power cannot be exercised in a manner

which will be contrary to or different from the procedure expressly provided in the Code. In the said judgment, the Supreme court has further observed that the section itself (Section 151) says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

(ii) In Sheodev Singh v. State of Punjab, AIR 1963 SC 1909, the Supreme court held that every court of plenary jurisdiction has inherent power to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

(iii) In the case of Raja Soap Factory v.

Santharaj, AIR 1965 SC 1449, it was posited by the Supreme Court that Section 151 of the Code preserves inherent power of the court as may be necessary for the ends of justice or to prevent abuse of the process of the court. That power may be exercised where there is a lawful proceeding before the court. It, however, does not authorise the court to invest itself with jurisdiction where it is not conferred on it by law.

(iv) In Shikharchand Jain v. Digambar Jain Praband Karini Sabha, AIR 1974 SC 1178, the Apex Court held that it is open to any court to take notice of subsequent events after the institution of the suit and to grant relief to the parties where it is shown that:

(i) the relief claimed originally has by reasons of subsequent change of circumstances become inappropriate; or

(ii) it is necessary to take notice of subsequent events in order to shorten litigation; or

(iii) it is necessary to do so in order to do

complete justice between the parties.

(v) In Kavita Trehan's case (supra), a clearing and forwarding agent filed a suit for declaration of her lien over goods of the principal for non-payment of commission. Under the ex parte mandatory injunction, she sold the goods and appropriated the amount. Ultimately, the suit was dismissed. It was held that the court could order status quo ante in the exercise of inherent powers, Section 144 being inapplicable.

53. Applying the principles laid down by the Supreme Court as well as the High Courts in above referred to judgments to the facts of the present case and in view of the fact that Appeal from Order being continuation of proceedings before the trial court, this Court can pass all appropriate orders which the trial court could have passed to restore the status quo ante. This power is inherent power available to all Courts to do justice and no technicalities can or should come in the way of the Court from doing what is

necessary to be done, particularly when the plaintiff has abused the process of the Court. The principles for restitution or restoring status quo ante are clearly laid down in the decisions of the Supreme Court, this High Court and other High Courts which have been referred to in the foregoing paragraphs of this judgment.

54. Thus, it is clear that the trial Court has committed a serious error of law and fact. In the facts and circumstances of the case, when the court has already come to the conclusion that the plaintiff's possession is disputed one and not a legal one and when the order of status quo has been misused by the plaintiff, it is the legal as well as moral obligation and incumbent upon the Court to pass an order for restoration of possession. Therefore, even under the provisions of law of restitution, the learned trial Judge ought to have restored the possession and even otherwise the inherent powers of the Court under section 151 of the Code always empowers the Court to do any action in ex-debitio justicio i.e., to

secure the ends of complete justice. In instant case, the trial Court has failed to exercise that powers and therefore this Court being a Court of appeal and the appeal from order being a continuation of suit, this Court can also exercise powers under section 151 of the Code to do complete justice between the parties by passing order of status quo ante by ordering restoration of possession of the suit land in favour of defendant No.2.

55. The contention of Mr. Soparkar, learned senior advocate of the plaintiff, that the appeal against refusal of the trial court to grant restoration/restitution or status quo ante of the suit land is not maintainable, has no substance and merit and, therefore, same is rejected. According to this court, it is a super-technical contention and it has no merit and substance. The High Court being the appellate court having all the powers of the trial court and appeal being continuation of the civil proceedings is entitled to pass all such orders which determining the

Appeal and Application for injunction Ex.5. Both the parties before the trial court are in appeal and, therefore, Ex.5 is at large before the High Court and if the High Court considers it just and appropriate, restitution and restoration of possession ante on the date of the suit ought to be granted. Procedure is but a handmaiden of justice and when there is abuse of the process of the Court, the High Court is not powerless to grant just equitable and adequate relief of status quo ante by directing the plaintiff to restore possession of the suit land in favour of defendant No.2 who is the rightful owner of the suit land by virtue of the sale deed executed by defendant No.1 in her favour and therefore, it would be just and proper to command the plaintiff to restore the status quo ante in respect of the suit land. The appeal is also required to be allowed in respect of status quo about ownership of the suit property till the final disposal of the suit.

56. In view of the aforesaid discussion,

according to this Court, there is absolutely no prima facie case in favour of the plaintiff nor balance of convenience tilts in its favour and there is no question of causing irreparable injury to the plaintiff the reliefs as prayed for are not granted. On the contrary, irreparable injury would be caused to defendant No.2 who is the rightful owner of the suit land and was in possession of the suit land on the date of filing of the suit by virtue of the sale deed executed by defendant No.1 in her favour on 8.12.2005.

57. In view of the foregoing discussion, according to this court, the following conclusions are called out and drawn:

(i) The suit filed by the plaintiff for specific performance of contract entered into between the plaintiff and defendant No.1 on 6.2.1992 is time barred.

(ii)The plaintiff was never ready and willing to perform its part of the contract as it remained

silent after executing the agreement to sell till the suit is filed.

(iii) The plaintiff has never obtained or attempted to obtain necessary and requisite permission in terms of the agreement to sell.

(iv) Defendant No.1 never refused to sign applications/documents seeking permission/ transfer from the competent authority put forward by the plaintiff for his signature. In fact, no application/document/letter were ever put before defendant No.1 by the plaintiff for his signature.

(v) The plaintiff has failed to prove that it has paid the remaining amount under the agreement to sell.

(vi)The agreement to sell is hit by the provisions of section 63 (1) (c) of the Tenancy Act. Therefore, the agreement to sell itself is void abinitio and not enforcible at law.

(vii) The plaintiff has failed to prove that possession of the suit land was handed over to it by defendant No.1.

(viii) On the basis of the voluminous documentary evidence, it is proved that defendant No.1 was always in possession of the suit land. However, the plaintiff has after obtaining ex-parte ad-interim injunction, which is in the nature of directing defendants to maintain status quo which was not served upon them for a period of about ten days, the plaintiff has forcibly entered in the suit land and taken over possession of the suit land with muscle power. Such an action on the part of the plaintiff is nothing but taking law in its hand and an abuse of process of court.

(ix) In view of the above factual situation and law settled by the Supreme Court, this Court is not powerless to grant just, equitable and adequate relief of status quo ante, i.e., restoration/restitution of the suit land to its

owner by commending the plaintiff to restore the possession of the suit land to defendant No.2 and restore the status quo ante.

58. Seen in the above context, Appeal from Order No.185 of 2006 filed by the plaintiff deserves to be dismissed by rejecting the application Ex.5 in toto whereas Appeal from Order No.188 of 2006 filed by the defendants deserves to be allowed by quashing and setting aside the impugned passed below application Ex.5 by which the defendants are directed to maintain status quo about the ownership of the suit land till final disposal of the suit. So far as the finding with regard to the plaintiff's possession is disputed one and not legal one deserves to be confirmed and maintained. On the facts and in the circumstances of the case, necessary directions are to be issued to the plaintiff for restoration/restitution of the possession of the suit land to defendant No.2 and to restore status quo ante.

59. For the foregoing reasons, Appeal from Order No.185 of 2006 filed by the plaintiff fails and accordingly it is dismissed with no order as to costs whereas Appeal from Order No.188 of 2006 filed by defendant Nos.1 and 2 succeeds and accordingly it is allowed with no order as to costs, the result of which is that the application Ex.5 filed by the plaintiff before the trial court is dismissed in toto. The plaintiff is directed to restore the possession of the suit land in favour of defendant No.2 and thereby restore the status quo ante. The plaintiff is directed to handover peaceful and vacant possession of the suit land to defendant No.2 within four weeks hereof failing which it would be open to defendant No.2 to take legal recourse against the plaintiff for non-compliance of the order directing the plaintiff to restore the possession of the suit land in favour of defendant No.2.

60. Since both these Appeals from Order are disposed of in terms of the aforesaid order and

directions, Civil Application No. 7936 of 2006 filed in Appeal from Order No. 185 of 2006 praying to direct the defendants to maintain status quo as to the possession as well as ownership of the property of the suit land and Civil Application No. 8132 of 2006 filed in Appeal from Order No. 188 of 2006 praying to stay the implementation, execution and operation of the order dated 30.6.2006 rendered below application Ex.5 in Special Civil Suit No. 225 of 2005 by the learned 4th Additional Senior Civil Judge, Ahmedabad (Rural) during the pendency and final disposal of the Appeal from Order, do not assume any survival value and hence they are disposed of with no order as to costs.

(A.M. Kapadia, J.)

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